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in the

Supreme Court

of the

United States

October Term, 1969

No. 574

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

DEVELOPMENT CORPORATION OF AMERICA, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioner, United Bonding Insurance Company, seeks review of a decision of the United States Court of Appeals, Fifth Circuit, which affirmed a Final Judgment, the entry of which was stipulated to by the Petitioner in the trial court.

For clarity, Petitioner, United Bonding Insurance Company will be referred to as "United" and the Respondent, Development Corporation of America, Inc. will be referred to as "DCA". Although not a party to this cause, United's principal on the surety bond, International Electrical Contractors, Inc., will be referred to as "International."

The following symbols will be used:

"R." for Record

"Ex." for Exhibit

"App." for Original Appendix in Court of Appeals

"App. B" for Appendix B

JURISDICTION

Although United seeks review by Writ of Certiorari, the Petition for Writ of Certiorari is not agreeable with Rule 19, Supreme Court Rules. The Court of Appeals did not render a decision in conflict with the decision of another court of appeals, nor did it decide a federal question or an important state question in conflict with the state law. Finally there are no special and important reasons for granting review on writ of certiorari for the decision merely settled a monetary dispute between two ordinary parties.

STATEMENT OF THE CASE

United's Statement of the Case does not detail the course of the proceedings and its disposition below nor does it contain all of the relevant facts. The Statement thus needs the following amplification:

DCA instituted this action against United upon a performance bond delivered to DCA in connection with a construction project known as "Hollywood Towers Apartments", wherein International was principal and United was surety. (R. 1-5)

Pursuant to notice the cause proceeded to trial before the District Judge, without a jury. The trial had barely commenced when United announced in open court that it had authority to settle the matter (App. 37; App. B 1) and after a recess the parties stipulated to the entry of a judgment in favor of DCA and against United in the total amount of $125,000.00 with United reserving the right to appeal as to any prior ruling of the court. (App. 38; App. B 1) The trial was then adjourned and the court entered its Findings of Fact and Conclusions of Law (App. 40-43; App. B 1-4) and thereupon entered the Final Judgment from which United appealed to the United States Court of Appeal, Fifth Circuit. The Court of Appeals affirmed the Final Judgment, and it is from this decision that United seeks review.

In 1964, DCA became the general contractor for the construction of the Hollywood Towers Apartments, Hollywood, Florida, which construction was to be in accordance with plans and specifications prepared by Charles F. McKirran & Associates. (App. 14; App. B 2) There were

various bidders on the electrical portion of the work and DCA made a determination to award the electrical work to International. (App. 15) On August 10, 1964, DCA notified International of its intent to award International the electrical work when International had complied with the acquisition of a performance bond. (P. Ex. 1; App. B 2) A contract between DCA and International, dated August 10, 1964, for the electrical work was drawn by DCA and submitted to International. (P. Ex. 2; App. 16-17) Included in the contract was certain optional work which, if eliminated, would result in deductions from the contract price. (P. Ex. 2)

Upon receipt of the form contract, International requested that the contract be modified (P. Ex. 3; App. 18) and made application through an agent for United to issue a performance bond. (P. Ex. 4) On September 1, 1964, International and United entered into a performance bond in favor of DCA which bond recited that International and DCA had entered into a contract for the electrical work for the Hollywood Towers Apartments, the date of which contract, however, was left blank. (P. Ex. 6) The original bond was delivered by International to DCA. (App. 20) Thereafter, pursuant to International's request, the form contract between International and DCA was revised and DCA and International signed the contract which bore the date September 28, 1964. (P. Ex. 5; App. 20)

Shortly after proceeding with the electrical work for the Hollywood Towers Apartments job, International commenced experiencing financial difficulties. (App. 22) In January, 1965, International went into default on the job and it became necessary for DCA to advance funds to meet International's payrolls and material invoices. (App. 22)

DCA notified United of this problem and volunteered to enter into a funding agreement with International so that International could complete the job. (P. Ex. 7) DCA then entered into a funding agreement with International whereby it agreed to fund the electrical work for International (Pl. Ex. 9), which procedure met with the approval of United. (Pl. Ex. 8) International continued on the job and as it progressed DCA sought approval from United for extraordinary disbursements of Funds. (P. Ex. 13; App. 24)

The job progressed until May 1965, when United advised DCA it had no liability for the completion of the electrical work (P. Ex. 12) and immediately thereafter International pulled its men and equipment from the job. (App. 25) DCA then proceeded to have the electrical portion of the work completed. (App. 27-29)

ARGUMENT

United's contention that the United States Court of Appeal, Fifth Circuit, failed to apply the law of Florida is without merit.

In support of this contention, United (as do all compensated sureties) relies on a 19th century case decided under the rule of *strictissimi juris*. This case, *Booske* v. *Gulf Ice Co.*, 24 Fla. 550 5 So.247 (1888), and the subsequent case of *Sewell* v. *Huffstetler*, 83 Fla. 629, 93 So.162 (1922) merely hold that where the terms of a bond sued upon are clear and unambiguous, the surety cannot set up a defense which seeks to lay the foundation for the intro-

duction of parol testimony to contradict the terms of the bond. This was the holding in *Booske* v. *Gulf Ice Co.* as clarified by the Supreme Court of Florida in *Brown* v. *Avery*, 63 Fla. 355, 58 So.34 (1912).

Even if United had correctly set forth the substantive law of Florida it would have had no application to the case at bar. This was not an action for breach of the contract between DCA and International as United suggests. It was an action on the performance bond which United saw fit to issue in blank to secure a contract between DCA and International, dated "August __, 1964". If the performance bond issued by United had been clear and unambiguous, and contained the specified date of the actual contract, United might then be in a position to argue that DCA could not recover on the bond. Even so, this argument would run contrary to the now substantive law of the State of Florida, for Florida long ago acknowledged the 20th century by commencing to minimize the rule of *strictissimi juris*. *American Surety Co. of New York* v. *Smith*, (1930) 100 Fla. 1012, 130 So.440. This acknowledgment in Florida has now developed to the point that the real inquiry is whether United's liability under its bond should be discharged because there was no contract dated "August __, 1964" and, if so, to what extent.

Florida has aligned itself with modern jurisprudence by recognizing that a compensated surety's obligation is coextensive with that of the principal and that contracts of a surety for hire are construed most strongly in favor of the obligee. *Lambert* v. *Heaton*, (1st D.C.A. Fla. 1961) 134 So.2d 536. Florida has also adopted the rule that a departure from a construction contract will not auto-

matically relieve and exonerate a surety, but, if there is a departure which results in injury to the surety, the surety will only be relieved and discharged to the extent of its injury. *Gibbs* v. *Hartford Accident & Indemnity Co.*, (Fla. 1952) 62 So.2d 599; *Gruman* v. *Sam Breedon Construction Co.*, (2nd D.C.A. Fla. 1963) 148 So.2d 759.

United's contention in this case is similar to the compensated surety's contention in the case of *National Union Fire Insurance Company of Pittsburgh, Pa.* v. *Robuck*, (1st D.C.A. Fla. 1967) 203 So.2d 204, *cert. denied* (Fla.) 209 So.2d 672,212 So.2d 809. In that case the principal presented to the surety a forged construction contract for a shopping center and the surety issued its bond. On appeal from an adverse judgment, the surety argued that it bonded only a fictitious contract and its obligation could not be extended in any manner. In rejecting this contention, the Florida appellate court held:

> "National Union undertook to bond the shopping center which was to be constructed by the principal Griggs. A Surety's obligation is generally coextensive with that of the principal, and contracts of a surety for hire are construed most strongly in favor of the obligee. A similar defense was presented in *New York Indemnity Co.* v. *May*, which held that it was the duty of the surety, before executing the bond, to satisfy itself as to the true terms of the building contract referred to in the bond."
> 203 So.2d 204, 206.

Interestingly enough, *New York Indemnity Co.* v. *May*, (1931) 37 Ariz. 462, 295 P. 314, relied upon by the Florida court in its opinion, involved a case where the date of the actual contract differed from the date of the contract recited in the surety's bond.

In the present case, it is obvious that United undertook to bond the electrical work for its principal, and in doing so it had the duty to satisfy itself as to the true terms of the contract referred to in its bond. Can it now be said that United discharged this duty when it saw fit to issue its bond securing a contract dated "August ____, 1964", (P. Ex. 6) while its principal was requesting that the actual contract be modified (P. Ex. 3) so as to reduce the exposure to both principal and surety?

Even if there was a departure from the contract dated "August ____, 1964" this would not relieve and exonerate United, for under Florida law United would only be relieved to the extent of its injury. Yet again, United elected to stipulate to a judgment for considerably less than the amount claimed by DCA (R. 3) rather than proceed at trial with proof that it was injured because there was no contract dated "August ____, 1964."

CONCLUSION

The decision of the United States Court of Appeals, Fifth Circuit, is not contrary to the substantive law of the State of Florida. Instead it acknowledges and adheres to the law of the State of Florida. Further, the decision is not in conflict with the decision of another court of appeal, nor does it decide a question of law that is important to the public. The decision merely affirmed a judgment, the entry of which was stipulated to in trial court, which is of interest only to the parties.

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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